

March 23, 2004

BY ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Written Ex Parte Presentation, In the Matter of Section 271
Petitions for Forbearance of BellSouth, Qwest, SBC and Verizon,
WC Docket Nos. 04-48, 03-260, 03-235 and CC Docket No. 01-338*

Dear Ms. Dortch:

This *ex parte* letter responds to arguments made by BellSouth, Qwest, SBC, and Verizon in support of their respective petitions for forbearance in the above-captioned proceedings. In particular, this letter discusses the showing required to support forbearance pursuant to section 10 of the Communications Act of 1934, as amended (“Act”), and the manner in which that showing differs from the demonstration required to remove an unbundling obligation pursuant to section 251.

The Bell Operating Companies (“BOCs”) have each filed a petition for forbearance pursuant to section 10 of the Act,¹ requesting that the FCC forbear from enforcing the independent obligation, pursuant to section 271 of the Act, to unbundle broadband facilities that those carriers are no longer required to unbundle pursuant to Commission decisions under sections 251(c)(3) and (d)(2).² In particular, the BOCs request that the Commission relieve them of their duty under section 271 to provide access to fiber-to-the-home (“FTTH”) loops and hybrid fiber-copper loops. The fundamental premise of the BOC petitions is that the showing required to remove an unbundling obligation pursuant to section 251 necessarily also establishes that the Commission, pursuant to section 10, must forbear from enforcing a similar obligation under section 271.

¹ 47 U.S.C. § 160.

² *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 04-48 (March 1, 2004) (“BellSouth Petition”); *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260 (Dec. 18, 2003) (“Qwest Petition”); *Petition for Forbearance of SBC Communications Inc.*, WC Docket No. 03-235 (Nov. 6, 2003) (“SBC Petition”); *New Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (Oct. 24, 2003) (“Verizon Petition”).

As MCI has shown previously, there is no need for the Commission to reach the substance of these petitions.³ Even if the Commission were to reach the merits of the petitions, a BOC would need to demonstrate that its request satisfies the substantive requirements of sections 10(a) and (b). As discussed below, the petitions fail to make the showing required by sections 10(a) and (b), relying instead on the erroneous notion that a Commission decision to remove an unbundling obligation pursuant to section 251 conclusively establishes that the Commission must forbear from enforcing a similar obligation pursuant to section 271. This letter discusses the showing required to satisfy sections 10(a) and (b), and the manner in which that showing differs from the demonstration required to remove an unbundling obligation pursuant to section 251. The letter then describes the specific findings in the *UNE Triennial Review Order* upon which the Commission relied in determining that incumbent LECs are not required by section 251 to unbundle hybrid fiber-copper loops or FTTH loops, and explains why those specific findings do not establish, without more, that the FCC must forbear from enforcing a BOC's independent statutory obligation to offer non-discriminatory access to that network element.

I. The Demonstration Required to Justify Forbearance Pursuant to Section 10 is Different from the Showing Required to Remove a Section 251 Unbundling Obligation

Sections 10(a) and (b) require the Commission to conclude that marketplace forces are sufficiently well-established to prevent unjust, unreasonable and unreasonably discriminatory practices, and to protect consumers. The Commission has found that section 251(d)(2), by contrast, allows the Commission to conclude that incumbent LECs need not offer unbundled access to a specific network element even if there is no competitive restraint on an incumbent's ability to charge excessive prices or exploit consumers. Therefore, contrary to the BOCs' arguments, the determination that a network element need not be unbundled pursuant to 251, without more, does not support a finding that forbearance from the comparable 271 requirement is warranted.

Sections 10(a) and (b) focus on whether the statutory provision or regulation to be eliminated is needed to prevent a carrier from exercising market power by, for example, charging excessive rates or engaging in unlawful discrimination. Stated differently, section 10 in effect asks whether marketplace forces are sufficiently well-established that they have supplanted the need for the regulatory requirement from which relief is sought.

³ See *Ex Parte* Letter from ALTS, CompTel/ASCENT, MCI, *et al.* to Marlene H. Dortch, FCC, WC Docket Nos. 03-260, 03-235, 03-220, 03-157, 03-189 and CC Docket No. 01-338 (March 1, 2004) (explaining that section 10(d) bars the requested relief); see also *Ex Parte* Letter from Christopher J. Wright, Counsel for Z-Tel Communications, Inc., to Marlene H. Dortch, FCC, WC Docket Nos. 03-260, 03-235, 03-220, 03-157, 03-189 and CC Docket No. 01-338 (March 5, 2004) (explaining that section 271(d)(4) bars the requested relief).

This reading of the statute is consistent with many years of Commission decisions, in which the Commission concluded that refraining from regulation is appropriate if and only if the carrier has no market power. For example, in determining that it was appropriate to require mandatory detariffing with regard to interstate interexchange services, the FCC considered whether carriers would be able to charge supra-competitive rates for those services in the absence of tariffing requirements. Based upon evidence regarding the high elasticity of demand and the willingness of consumers to switch carriers, the FCC found that it was “highly unlikely that interexchange carriers that lack market power could successfully charge rates, or impose terms and conditions . . . that violate Section 201 or 202 . . . because any attempt to do so would cause their customers to switch to different carriers.”⁴ The Commission concluded that the tariffing requirements were not necessary because marketplace forces would ensure that the rates and terms for interexchange services would be just and reasonable, and that consumers and the public interest would be protected.⁵

The Commission previously has found that no comparable showing is required in order for the Commission to determine that an incumbent LEC is not required to unbundle a network element under section 251. Indeed, the only factor the Commission is required to consider in making its section 251 unbundling decision is whether a competitive LEC would be impaired in its ability to offer service if it did not have access to the element. The FCC has concluded that an “impairment” determination pursuant to section 251(d)(2) does not require the Commission to decide whether access to the unbundled element is necessary to ensure that the charges or practices of the incumbent carrier are just, reasonable, and not unreasonably discriminatory. Nor does section 251(d)(2) require the Commission to consider whether access to the unbundled element is necessary to ensure that consumers are protected and the public interest is served.

Hence, even assuming, *arguendo*, that the Commission were to decline to order an incumbent LEC to unbundle a network element under section 251 based on a finding of non-impairment, that finding, without more, would not be sufficient to satisfy the showing required by sections 10(a) and (b). A determination that a competitive LEC would not be impaired if it were denied access to a network element does not mean that

⁴ *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 20730, ¶ 21 (1996).

⁵ *Id.*; see also *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, 12 FCC Rcd 8596 (1997) (forbearing from applying tariffing requirements to non-dominant carriers for the provision of exchange access services based on a finding that, without market power, such carriers are unlikely to behave anti-competitively because doing so would likely result in a loss of customers); *2000 Biennial Regulatory Review; Policy and Rules Concerning the International, Interexchange Marketplace*, 16 FCC Rcd 10647 (2001) (relying on increased competition for international interexchange services to support detariffing of non-dominant carriers).

the competitive LEC necessarily would be able to constrain an incumbent's ability to charge excessive prices or exploit consumers. Indeed, the Commission expressly recognized this distinction in the *UNE Triennial Review Order*:

The purposes of a market power analysis are not the purposes of section 251(d)(2). . . . the Act requires only that network elements be unbundled if competing carriers are impaired without them, *regardless of whether the incumbent LEC is exercising market power* or the unbundling would eliminate this market power. A market power analysis would go to the *question of whether an incumbent LEC could raise its retail prices unchecked*; the impair analysis asks whether a new entrant can provide its services without the UNE.⁶

Sections 10(a)(1) and (a)(2), as noted, require the Commission to determine that enforcement of the regulation from which forbearance is sought is not necessary to ensure that rates are just, reasonable, and not unreasonably discriminatory, and is not necessary to protect consumers. As the Commission's prior forbearance decisions appear to recognize, the Commission may not exercise its forbearance authority in a manner that exposes consumers to the unchecked market power of an incumbent LEC. In particular, where a carrier possesses market power over bottleneck facilities or services, the Commission has either declined to grant forbearance, or conditioned forbearance on continued non-discriminatory access to those critical inputs. For example, in the context of a request for forbearance from the separate affiliate requirements for nonlocal directory assistance, the FCC concluded that the BOCs continued to benefit from competitive advantages stemming from their position as the dominant provider in the local exchange and exchange access markets.⁷ As a result, the Commission conditioned its grant of forbearance on continued compliance "with the nondiscrimination requirements set forth in section 272 with respect to the in-region telephone numbers

⁶ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, as modified by *Errata*, 18 FCC Rcd 19020, ¶ 109 (2003) ("*UNE Triennial Review Order*") (emphasis added).

⁷ *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, ¶ 35 (1999) ("*USWC NDA Order*") (finding that because of their market power, the BOCs had "access to a more complete, accurate, and reliable [directory assistance] database than [their] competitors."); *BellSouth Petition for Forbearance for Nonlocal Directory Assistance Service*; *Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services*; *Petition of Bell Atlantic for Further Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, 15 FCC Rcd 6053, ¶ 15 n.42 (2000) ("*BOC NDA Order*").

[that the BOCs] use[] in the provision of nonlocal directory assistance service.”⁸ Absent non-discriminatory access to those listings, the FCC found that none of the requirements of section 10(a) could be met.⁹

The FCC also declined to grant a petition requesting that it forbear from enforcing its depreciation accounting requirements, despite arguments that sufficient competition existed to ensure just and reasonable rates and protect consumers.¹⁰ In that case, the Commission concluded that none of the three prongs of section 10(a) had been met because, among other factors, “forbearance would be likely to raise prices for interconnection and UNEs, (particularly those that may constitute bottleneck facilities) inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service.”¹¹ The Commission has similarly declined to grant forbearance where it has determined that competition is insufficient to deter anti-competitive conduct.¹²

⁸ *BOC NDA Order* ¶ 15 n.42; *USWC NDA Order* ¶¶ 35-36; see also *Bell Operating Companies’ Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934*, 13 FCC Rcd 2627 (Com. Car. Bur. 1998) (conditioning forbearance on continued access by unaffiliated entities to listings used to provide E911 and reverse directory services).

⁹ See *USWC NDA Order* ¶¶ 35-37, 46-47, 53 (relying on continued non-discriminatory access to in-region directory listings to find that enforcement of the separate affiliate safeguards of section 272 was not necessary).

¹⁰ See *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd 242, ¶ 54 (1999) (rejecting USTA’s contention that the “thousands of interconnection agreements that incumbent LECs have negotiated with alternative providers of local exchange service, competition from wireless and personal communications services, and the freedom that cable companies and public utilities now have to enter telecommunications” were sufficient to constrain the incumbent LECs’ ability to manipulate depreciation expenses).

¹¹ *Id.* ¶ 63.

¹² See, e.g., *COMSAT Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083 (1998) (declining to grant forbearance from dominant carrier regulation where COMSAT would be free to increase its rates without losing customers because of a lack of competitive alternatives).

II. The Determinations in the *UNE Triennial Review Order* With Respect to Hybrid Loops and FTTH Do Not Provide the Required Showing for Forbearance from the Access Requirements of Section 271

In the *UNE Triennial Review Order*, the Commission determined that incumbent LECs are not required, pursuant to section 251, to unbundle hybrid fiber-copper loops or FTTH loops. An analysis of the determinations with respect to hybrid loops and FTTH loops reveals clearly that those specific findings do not establish the showing required for forbearance from enforcing a BOC's independent statutory obligation to offer non-discriminatory access to those loops. Indeed, far from supporting forbearance, the FCC's finding pursuant to section 251(d)(2) that competitors are impaired without access to hybrid fiber-copper loops clearly suggests that incumbent LECs would not be constrained by marketplace forces in setting prices for those loops or otherwise engaging in anti-competitive practices. Moreover, the Commission's finding of non-impairment with respect to FTTH does not, without more, support a finding that incumbent LECs lack market power, which is the conclusion required to support forbearance pursuant to section 10.

Hybrid Fiber-Copper Loops. The FCC concluded in the *UNE Triennial Review Order* that competitors *are impaired* without access to hybrid fiber-copper loops.¹³ Balanced against this finding of impairment, the FCC relied upon other factors, principally its desire to foster deployment of advanced telecommunications services pursuant to section 706, to conclude that incumbent LECs should not be required to offer unbundled hybrid fiber-copper loops pursuant to section 251.¹⁴ Given the Commission's finding that competitors are impaired without access to hybrid loops, it is impossible to conclude that sufficient competition exists to protect consumers and assure just and reasonable rates, as required by sections 10(a) and (b). In fact, the finding of impairment confirms the opposite conclusion – that competition is demonstrably not sufficiently robust to support a decision to forbear from enforcing competitive LECs' right of access to unbundled hybrid fiber-copper loops.

The Commission's observation in the *UNE Triennial Review Order* that cable companies offer some competition to incumbent LECs in the provision of broadband services does not undermine that conclusion.¹⁵ The order's brief discussion of the presence of cable companies is not inconsistent with the Commission's finding of impairment, nor does it show that cable competition is sufficient to protect consumers or assure just, reasonable, and not unreasonably discriminatory rates, as required by section 10. Even assuming a cable operator is offering broadband services in a given geographic

¹³ *UNE Triennial Review Order* ¶ 286 (emphasis added).

¹⁴ *Id.* ¶¶ 286, 288, 290.

¹⁵ *Id.* ¶ 292.

market, the result would be, at best, a duopoly, which the Commission previously has concluded is insufficient to protect consumers or ensure just and reasonable rates.¹⁶

FTTH. In the pending petitions, the BOCs have asked the Commission to forbear from requiring the BOCs to unbundle FTTH loops pursuant to section 271, because the section 251 unbundling obligation with respect to FTTH loops has been removed. Although the Commission did find a lack of impairment with respect to FTTH loops, non-impairment is not automatically equivalent to a finding of no market power, which is the conclusion required to support forbearance pursuant to section 10.

As noted above, the Commission held in the *UNE Triennial Review Order* that the impairment analysis under section 251 focuses on whether there are barriers to entry, not on whether there is sufficient competition to constrain an incumbent LEC from charging supra-competitive prices or otherwise acting anti-competitively.¹⁷ In fact, the Commission explicitly declined to tie impairment to the existence of market power, finding instead that “impairment . . . is different from, and does not prejudge, the standard we use to assess a carrier’s dominant or non-dominant status.”¹⁸

Moreover, the FCC expressly acknowledged that “there may be circumstances where an incumbent LEC has market power with regard to a particular input, but competitors are not impaired without access to the element.”¹⁹ Because section 10

¹⁶ See *Application of EchoStar Communications Corp.*, 17 FCC Rcd 20559, ¶¶ 275-76 (2002) (“it is well recognized that competition . . . has the greatest potential to bring consumer welfare gains”); *id.* ¶ 280 (loss of competition by reducing number of viable service providers from three to two or two to one is likely to result in significant harm to consumers, “creating the potential for higher prices and lower service quality, and negative impacts on future innovation”); see also Statement of Chairman Michael K. Powell, CS Docket No. 01-348, at 1 (rel. Oct. 10, 2002) (“At best, th[e] merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.”).

¹⁷ *UNE Triennial Review Order* ¶ 7 (a requesting carrier is impaired “when lack of access to an incumbent LEC network element poses a *barrier or barriers to entry*, including operational and economic barriers, that are likely to make entry into a market uneconomic”) (emphasis added). Of course, actual competition may be evidence of a lack of barriers to entry. See *id.* ¶ 84.

¹⁸ See *id.* ¶ 246 n.738; see also *id.* ¶ 109 (emphasis added) (rejecting “arguments that we should require the unbundling of network elements to remove an incumbent LEC’s market power in the retail market and that we should use the [*Horizontal Merger Guidelines*] to identify market power”).

¹⁹ *Id.* ¶ 110 (emphasis added) (concluding that the FCC need not find that a wholesale market exists for a given element in order to find non-impairment).

requires in these circumstances that a BOC demonstrate that marketplace forces are sufficient to prevent its exercise of market power if forbearance is granted, a finding of non-impairment for a particular element under section 251 does not establish, without more, that the FCC must forbear under section 10 from the independent section 271 access requirement with respect to that element. In this case, not one of the BOCs has even attempted to show that marketplace forces in local markets would be adequate to constrain their market power and ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; that consumers are protected; and that forbearance would be in the public interest.

III. Conclusion

Because the BOCs have failed to demonstrate that sufficient competition exists to prevent the exercise of market power with respect to FTTH and hybrid loops in the relevant geographic and customer product markets, the relief requested in the BOC petitions must be denied.

Sincerely,

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